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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 176

HAGGAR COMPANY,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

Respondent.

BRIEF FOR PETITIONER

Respectfully submitted,

LLOYD E. ELLIOTT,
Dallas, Texas,
Attorney for Petitioner,
Haggar Company.

O. D. BRUNDIDGE,
Dallas, Texas,
Of Counsel.

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I

The Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals (R. 44-48) is reported in 104 Fed. (2) 24, as Haggar, Petitioner, vs. Commissioner of Internal Revenue, Respondent, and that of the United States Board of Tax Appeals in 38 B. T. A. 141.

II.

Jurisdiction

1. The date of the judgment to be reviewed is May 23, 1939 (R. 48). Motion for rehearing (R. 49-50) was overruled June

17, 1939 (R. 51).

2. The Honorable Circuit Court of Appeals affirmed the decision of the United States Board of Tax Appeals in favor of Respondent upon the ground that Sec. 215 (f) of the National Industrial Recovery Act did not permit a capital stock tax return, once filed, to be amended, even within the time fixed for the original filing of the return.

3. The jurisdiction of this Honorable Court was invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347, and Supreme Court Rule 38, Sect. 5(b).

4. Certiorari was granted because the decision of the Honorable Circuit Court of Appeals for the Fifth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Glenn vs. Oertel Company*, 97 Fed (2) 495, and of the Court of Claims in *Philadelphia Brewing Co. vs. United States*, 27 Fed. Supp. 583.

III.

Statement of the Case

On August 22, 1933, Petitioner, a Texas corporation, filed its capital stock tax return pursuant to Section 215(d) and (f) of the National Industrial Recovery Act (48 Stat. 195-208), giving as the declared value of its capital stock, its par value of $120,000.00; petitioner assuming that the Act called for a declaration of such par value (R. 22).

On September 28, 1933, and within the extended time (Treasury Decisions Nos. 4368 and 4386) for filing capital stock tax returns for the year ending June 30, 1933, petitioner, in good faith, filed a second or amended capital stock tax return, declaring the actual value of its capital stock at $250,000.00 (R. 23).

On March 15, 1934, petitioner filed its income and excess profits tax return for 1933, in which it inadvertently computed excess profits tax exemption at 12½ per cent of $370,000.00 stead of $250,000.00 as it intended, and now claims is the proper basis for compution of its excess profits tax.

Respondent, contending that the declared value in the return of August 22, 1939 should control, assessed a deficiency $1,376.52 excess profits tax against petitioner on March 3, 37 (R. 26). An appeal to the Board of Tax Appeals (filed ay 28, 1937, R. 2), being against petitioner (R. 11-15), it ed a petition for review in the United States Circuit Court Appeals for the Fifth Circuit (R. 16-21), where the decision of the United States Board of Tax Appeals was affirmed the ground that, under Section 215(f) National Industrial ecovery Act, a capital stock tax return could not be amended ithin the time for filing returns (R. 44-48).

IV.

Specification of Error

The Honorable Circuit Court of Appeals erred in holding hat petitioner's capital stock tax return, filed pursuant to ection 215(f) of the National Industrial Recovery Act on ugust 22, 1933, could not be and was not amended by the econd return filed September 28, 1933, and within the extended time for filing capital stock tax returns for the year ending une 30, 1933.

V.

Summary of Argument

1. The inhibition against amending the "first return" made ursuant to Section 215(f) National Industrial Recovery Act as not intended to prohibit amendment of a return within the

time permitted for filing the first return, but only to prohibit amendment of the return for the first year so that it might remain as the basis for computing excess profits taxes for subsequent years.

2. To construe the Act as prohibiting the correction of errors by amendment within the time for filing the first return would make it violative of the due process clause of the Fifth Amendment.

Argument

1. Sect. 215(f) of the National Industrial Recovery Act is, in part, as follows:

> "For the first year ending June 30 in respect to which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its *first* return under this section (which declaration of value cannot be amended), as of the close of its last income taxable year ending at or prior to the close of the year for which the tax is imposed by this section.*** For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value," etc.

Broadly, the question involved is whether a return once filed pursuant to the above provision may be amended within the time provided for filing the first return; specifically, whether the word "first" (underscored above) means the first paper filed in an effort to make the return provided by the Act, or the return, original or amended, for the first year.

The United States Circuit Court of Appeals for the Sixth Circuit, in *Glenn vs. Oertel Co.*, 97 F. (2d) 495, upon consideration of the Congressional intention, as reflected by the entire Act and Conference Reports, held that the Act was not intended to lay a tax upon errors of the taxpayer; that since the return for the first year was to be the basis for taxation for

future years, it was this return which could not be amended; and hence that there was no inhibition against an amendment of the first return within the time allotted for making the return. This reasoning was followed, with like result, in *Philadelphia Brewing Co. vs. United States*, 27 Fed. Supp. 583.

And since the filing of the petition for certiorari in this cause, the United States Circuit Court of Appeals for the Fourth Circuit, on August 28, 1939, in *C. H. Mead Coal Co. v. Commissioner*, 394 C. C. H. ¶ 9678, made a like holding in construing Section 114 (b) (4) of the Revenue Act of 1934. In passing on the matter the court said:

> "In using the words 'first return' Congress evidently intended to include a completed first return or a first return as properly amended and did not intend to limit the taxpayer's right of election to the first form filed. Any other construction would, in fairness to the taxpayer, be too narrow and restricted. A first return is no less a first return because amended, provided the amendment be timely and is made to correct a mistake, made without any intent on the part of the taxpayer to take any undue advantage as to its tax payments, and without any bad faith. A different construction would, as said in the case of Glenn v. Oertel Co., 97 Fed. (2d) 495 (38-2 USTC Par. 9369), permit the government to lay a tax upon the taxpayer's errors rather than its income."

The Circuit Court of Appeals in this case, 104 F. (2) 26, 27, rejected the reasoning in *Glenn vs. Oertel*, supra, in favor of the assumed literal meaning of the words used, and the supposed legislative intention reflected by administrative interpretation and subsequent enactments. The court said:

> "The administrative interpretation of this and subsequent provisions in later revenue acts, incorporated in the Treasury Regulations, followed by subsequent enactments in which the same language is used, leaves no doubt

as to the legislative intent. The declared legislative purpose being to make the first return filed under the Act the basis of the computation of the tax, and recognizing the possibility that amended returns might be attempted the Congress expressly provided that the first declaration of value was not subject to amendment."

A review of subsequent legislation does not sustain the holding of the Honorable Circuit Court of Appeals, but to the contrary shows a legislative repudiation of the administrative interpretation of the Act in the respect here involved.

While *Glenn vs. Oertel Co.*, 13 Fed. Supp. 651, was pending on appeal from the decision of the District Court, an amendment was made, in the 1938 Revenue Act, designed to relieve taxpayers who made timely correction of "errors in calculation and other errors" in their declaration returns. Since the matter was then before the Circuit Court of Appeals, the Congress is presumed to have known that the administrative interpretation of this provision of Section 215(f) had been judicially challenged, and the results of it. It is therefore significant that in the amendment to the 1938 Act, the disturbing word "first" was eliminated from Sect. 601(f) (2), corresponding to Sect. 215(f) here involved. (See Appendix, p. 11, infra.)

The parenthetical phrase "(which declaration of value cannot be amended)" was left as originally enacted. This latter phrase leaves the entire section still literally susceptible of two constructions, namely, (1) that no amendment whatever can be made, and (2) that no amendment can be made after the expiration of the time for filing the return.

But while Section 601 (f) (2) of the 1938 Act is literally as susceptible to either of these two constructions as was Section 215(f) of the National Industrial Recovery Act, the following Congressional explanation removes all doubt as to the proper construction:

"The new section also alleviates the rigid provision of Section 105(f) of the 1935 Act that the valuation shall be as declared by the corporation in its 'first' return. Errors of calculation or other errors sometimes occur in first returns, and denial of all opportunity for correction appears unduly restrictive. Accordingly, the word 'first' as it appears the second time in section 105(f) of the 1935 Act, as amended, is eliminated from the corresponding language appearing in subsection (f) (2) of the new section. This will serve to give a corporation the right, so long as it acts within the time allowed for filing its return (including the last day of any extension period) for the year for which a declaration of value is required, to file subsequent returns for that year showing a different valuation, the valuation shown by the last timely return being binding." (See H. R. Report 1869, 75th Congress, Third Session, Committee on Ways and Means accompanying H. R. 9682, Internal Revenue Bulletin, No. 1, January 2, 1939, page 59).

There is no intimation that Congress in 1938 was making ny new discoveries or evolving any new philosophy of taxaion. It is fair to assume that the Ways and Means Comittee's criticism is an indictment of the narrow administrative onstruction that had resulted in the "denial of all opportunity or correction" of a "timely return" for a "declaration year." 3y the time the 1938 Act was passed, repeated reactments nd five years use had made the principle of binding capital tock tax declarations universally familiar to all taxpayers. There was no reason why, in view of this familiarity with the ovel taxing principle, more consideration should be given to he 1938 taxpayer than to the 1933 taxpayer who had been alled upon to make a return, for the first time, without knowedge of the principles underlying, or of his rights under, the ovel legislation. Hence the elimination of the word "first" annot be regarded as evidence of an intent to change the eaning of the former Act. Since the word had produced liti-

gation and caused an administrative interpretation which Congress characterized as "unduly restrictive," it is more reasonable to assume that "the purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law." *Helvering vs. New York Trust Co.*, 292 U.S. 455, 469, 54 S. Ct. 806-808.

There is no evidence of a legislative intention, either in the Act involved or subsequent enactment, to create provisions "unduly restrictive" of the right, universally recognized, of correcting honest mistakes.

2. The construction contended for by Respondent would render the Act unconstitutional, as depriving taxpayer of its property arbitrarily, and without due process of law. Petitioner overlooked instructions attached to the form for making return; and, assuming that it was required to do so, returned as the value of its stock its par value of $120,000.00 (R. 22). Being advised of its error, taxpayer, in good faith, attempted to amend its return by filing a second return declaring the actual value of its stock at $250,000.00 (R. 23). If this amendment be not allowed, petitioner is taxed upon a wholly arbitrary basis, upon its errors, and not its income.

It has many times been stated that:

> "Taxes are assessed on income and not on honest mistakes of the taxpayer." Morrow, Meek, et al vs. Ewing (C. C. A. 5), 57 (2d) 1.

It is logical to assume that Congress intended the taxpayer to declare a fair and reasonable value on its capital stock, and to base the tax on this value rather than to set up a method for arbitrarily levying a tax. If it be assumed that the tax is designed, as the Honorable Circuit Court of Appeals implies, to exact from the taxpayer everything that can be exacted from errors committed, and to lay a tax wholly without reference to values, then the tax is so arbitrary and capricious as to fall

before the due process clause of the Fifth Amendment.

> "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. Nichols v. Coolidge, 274 U.S. 531, 542, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081; Brushaber v. Union Pacific R. R. Co., 240 U.S.L. 24-25, 36 S. Ct. 236, 60 L. Ed. 493; L. R. A. 1917D, 414, Ann. Cas. 1917B, 713; Tyler v. United States, supra, 281 U.S. 504, 50 S. Ct., 74 L. Ed. 991, 69 A. L. R. 758." (Quoted from Heiner v. Donan, 285 U. S. 312, 52 S. Ct. 358).

The denial of the right to amend the first return within the time allotted for filing the first return would deprive petitioner of the rights accorded all other taxpayers who delayed the filing until the end of the extended time. Such denial would be discriminatory, and the tax based upon such a return a penalty. It would deprive petitioner of its property without due process of law.

Every consideration of reason and justice demands that an opportunity be given to correct honest mistakes. Doubts as to the proper construction of provisions which would deny this right should be "decided in favor of the taxpayer." Gould vs. Gould, 245 U.S. 151.

WHEREFORE, petitioner prays that the judgment of the United States Circuit Court of Appeals be reversed, and that petitioner have such other and further relief in the premises as to this Honorable Court shall seem meet and just.

Respectfully submitted,

LLOYD E. ELLIOTT,
Dallas, Texas,
Attorney for Petitioner,
Haggar Company.

O. D. BRUNDIDGE,
Dallas, Texas,
Of Counsel.

APPENDIX

National Industrial Recovery Act, C 90, 48 Stat. 195:

SEC. 215(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed * * *. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

SEC. 215(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. * * *

SEC. 216(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 214, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock. * * * as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Revenue Act of 1938

SECTION 601 (f) (2)

For each declaration year the adjusted declared value shall be the value as declared by the corporation in its return for such declaration year (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending with or prior to the close of such declaration year (or as of the date of organization in the case of a corporation having no income-tax taxable year ending with or prior to the close of such declaration year).